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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Takings Clause of the Fifth Amendment requires a state to pay just compensation when it deprives a person of all economically viable use of his land.

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER *

INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. It has its principal offices in Park Ridge, Illinois. AFBF was founded to pro-

* Written consents of the parties to the filing of this brief have been filed with the Clerk.

tect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico representing more than 3.8 million member families.

The South Carolina Farm Bureau Federation (SCFBF) is a voluntary non-profit membership association organized under the laws of the State of South Carolina. It has its principal offices in Columbia, South Carolina. SCFBF, individually and through joint and collective efforts, seeks to promote, protect and represent the economic, social and educational interests of farmers in South Carolina. SCFBF is composed of 47 county Farm Bureau organizations with a total membership of more than 103,000 member families in South Carolina. SCFBF is a member of the AFBF.

The American Farm Bureau Federation and the South Carolina Farm Bureau Federation have a direct interest in the outcome of this case. The members of AFBF and SCFBF own or lease significant amounts of property, and depend on their land for their livelihoods. They are, therefore, vitally interested in the proper interpretation of the Just Compensation Clause of the United States Constitution. The South Carolina Supreme Court's expansion of the circumstances in which a state may effectively dispossess an owner of his or her property without paying compensation is contrary to the interests of AFBF, SCFBF, and their members.

STATEMENT

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The question in this case is whether a state may totally destroy the value of a person's property by imposing land use restrictions, yet evade this constitutional obligation to pay compensation by pointing to some public harm that the regulation is intended to prevent. The South Carolina Supreme Court held that it may.

1. In 1986, petitioner David Lucas bought two undeveloped oceanfront lots in a development of single-family homes on the Isle of Palms, South Carolina. Pet. App. 33. He planned to build a home for himself and his family on one of the lots—as then permitted by South Carolina law—and to hold the other lot as an investment. Pet. App. 33, 36. Lucas paid a total of $975,000 for both lots, taking out a mortgage on which there was $495,000 principal outstanding on July 1, 1988. Pet. App. 36-37.

A subsequent amendment to South Carolina law prohibited the development of Lucas' two lots. Pet. App. 34. The Beachfront Management Act, S.C. Code Ann. § 48-39-10 *et seq.* (1988), barred the construction of any permanent structure except a walkway and small deck on the seaward side of setback lines drawn by respondent South Carolina Coastal Council (SCCC), the agency which administers the Act. Pet. App. 2, 34-35. Lucas' property lies entirely on the seaward side of the setback line. Pet. App. 35.

The land use restrictions imposed under the Beachfront Management Act were said to address the problem of erosion along the South Carolina coast's beach/dune system. Beachfront Management Act, Act No. 634, §§ 1, 2 (codified at S.C. Code Ann. §§ 48-39-250, 48-39-260 (Cum. Supp. 1990)); Pet. App. 4-8. The South Carolina General Assembly found that development close to that system had "accelerated erosion, and endangered adjacent property." *Id.* § 48-39-250(4); Pet. App. 5. It restricted such development because it found the beach/dune system to be "extremely important to the people of [South Carolina]," protecting "life and property by serving as a storm barrier,"

generating tourism, and providing a habitat for wildlife and a "natural health environment" for the state's citizens. *Id.* § 48-39-250(1); Pet. App. 4-5.

2. Petitioner filed suit against the SCCC in the South Carolina Court of Common Pleas. Lucas alleged that the Beachfront Management Act worked a taking of his property for public use for which the state was required by the Fifth Amendment to pay just compensation. Pet. App. 35.

The Court of Common Pleas held that the SCCC's actions pursuant ~~to the~~ Act had eliminated Lucas' "unrestricted right of use" of his land (Pet. App. 37) and thereby had deprived him of "the essential elements of ownership" (Pet. App. 39), infringing on "private property in the most traditional sense of the term' (Pet. App. 38). By permanently prohibiting construction on Lucas' two lots, the Court found, the SCCC "deprives Lucas of any reasonable economic use of the lots . . . and renders them valueless" (Pet. App. 37), so that "[t]he damage to the two lots by virtue of the restrictions prohibiting any form of development is total." Pet. App. 38. Because it interpreted this Court's decisions to mean "that regulatory activity by a governmental agency which denies an owner economically viable use of his land amounts to a taking under the Fifth Amendment . . . for which just compensation must be paid" (Pet. App. 40), even where the regulation "was enacted to . . . benefit . . . the general public" (Pet. App. 38), the Court of Common Pleas held it was "manifest that the imposition of the setback lines by the [SCCC] ha[s] resulted in a total taking of Lucas' two beachfront lots." Pet. App. 40. The court ordered respondent to compensate Lucas in the total amount of $1,232,387.50, calculated as the sum of the fair market value of the lots on July 1, 1988, and real property taxes and mortgage interest paid by Lucas since that date. Pet.

App. 40. In turn, Lucas was to tender a clear deed to the lots to the SCCC. Pet. App. 40-41.

3. The South Carolina Supreme Court reversed. It did not disturb the trial court's holding that the Act deprived Lucas of "private property in the most traditional sense." Pet. App. 38. A bare majority of the Court, however, held that a "nuisance-like exception" to the just compensation requirement applies (Pet. App. 12) whenever a use restriction serves to "prevent serious injury to the community" (Pet. App. 15), even though the restriction "operates to deprive a landowner of 'all economically viable use' of his property." Pet. App. 9. See also Pet. App. 11-12. Thus, because Lucas did not contest that the Beachfront Management Act "is necessary to prevent a great public harm" (Pet. App. 8), the court held that the bar on development of Lucas' property did not amount to a compensable taking.

Two members of the court dissented. They concluded, first, that the primary purpose of the Act was not to prevent a public nuisance but to eliminate "activities and effects" that could not "fairly be considered 'noxious' " (Pet. App. 27), and, second, that because the state had eliminated all "economically viable use" of Lucas' land, a taking had occurred. Pet. App. 30.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The protection of individual property rights was a core concern of the Framers of the Constitution and the Bill of Rights. The Framers regarded it, in fact, as "the first object of government." FEDERALIST No. 10, at 78 (Madison) (C. Rossiter ed. 1961). The Fifth Amendment's Just Compensation (or Takings) Clause is one of the guarantees at the heart of the constitutional design to protect private property rights.

The South Carolina Supreme Court's decision in this case takes the clear-cut constitutional command that "private property [shall not] be taken for public use, without just compensation," and transforms it into something unrecognizable. The Framers, with the concern manifested throughout the Bill of Rights that individual rights should not mechanically be subordinated to transient legislatures' conceptions of the common good, "designed [the Just Compensation Clause] to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might properly be forced to give up the use of their property—but only upon fair payment from the common purse. The South Carolina Supreme Court has turned this design on its head, substituting a scheme in which government must compensate an individual when it regulates so as to deprive him of his property, *except* when the taking can be broadly construed as "prevent[ing] serious injury to the community." Pet. App. 15. "[N]early every action the government takes" can be described as preventing some grave public harm, see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting), so under the South Carolina Supreme Court's approach the Takings Clause would cease to impose meaningful restraints on the behavior of government officials.

2. On even the narrowest reading of this Court's takings cases, the South Carolina Supreme Court erred. Those cases do not hold that entitlement to compensation for the total regulatory destruction of land's value depends upon the objective of the regulation. On the contrary, this Court has stated repeatedly over the past seventy years that a compensable regulatory taking occurs when government destroys all economically viable use of land—regardless of government's reasons for doing so. *E.g.*, *Keystone Coal*, 480 U.S. at 485. Since the South Carolina Supreme Court did not disturb the trial court's finding that the Beachfront Management Act destroyed all the use and value of Lucas' two lots, a compensable taking occurred and the decision below must be reversed.

3. Beyond this narrow ground for decision, this Court should use the instant case to clarify the general framework of takings analysis. The South Carolina Supreme Court's expansive conception of the police powers or nuisance exception to the just compensation requirement—which finds support in some of this Court's decisions—permits incursion on property rights that was simply not contemplated by the Framers of the Fifth Amendment. This Court should expressly disapprove the view of the exception expressed below, and enunciate legal standards that better reflect the plain language and original intent of the Takings Clause and its important place in our constitutional structure.

Amici urge this Court to reject outright the notion that the absolute and unequivocal terms of the Just Compensation Clause are qualified by a police powers or nuisance exception. Nothing in the provision's history or role in our Constitution gives warrant to government to " 'inva[de] private right under the pretext of the public good.' " *United States* v. *Lynah*, 188 U.S. 445, 470 (1903) (citation omitted). Even if this Court were to recognize an exception to the just compensation requirement—which *amici* believe would be unjustified—it should call a firm halt to the erosion of the Takings Clause by making clear that any exception is limited to instances in which government regulates nuisances that involve physical invasions of others' property.

ARGUMENT

I. The South Carolina Supreme Court's Decision Should Be Reversed Because It Is Well Established That Regulatory Destruction Of All Economically Viable Use Of Property Is A Taking Regardless Of The Regulation's Purpose.

For the Framers of our Constitution and Bill of Rights, private property supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). The Framers intended the Takings Clause of the Fifth Amendment to be one of the prime guarantors of these limits. The Clause was designed to ensure that individual rights to own, occupy, and use property—and the liberty interests dependent upon these rights—could not be confiscated to serve transient legislatures' conceptions of the common good. Though government was granted the power to deprive a person of property to convert it to public use, the exercise of this power was strictly conditioned on the payment of just compensation. In this way, the Framers struck a careful balance between individual rights and community needs. See *infra* Part II.B.

For this reason, this Court has never wavered from the position that total regulatory deprivation of the use and value of a person's land—such as the trial court explicitly found had occurred in this case—is always a compensable taking. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-296 (1981) ("A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' "), quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). Accord *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316-317 (1987); *United States* v. *General Motors Corp.*, 323 U.S.

373, 378 (1945); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

A state that destroys the value of a person's land has never been permitted to evade its constitutional obligation to compensate by pointing to the public purpose of its regulation, even if that purpose is to prevent serious harm to the community.[1] This Court has carefully stated and applied its regulatory takings analysis in the disjunctive: "land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or denies an owner economically viable use of his land.*' " *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987), quoting *Agins*, 447 U.S. at 260 (emphasis added). See also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Hodel* v. *Irving*, 481 U.S. 704, 716-718 (1987); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 127 (1978); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908). In *Keystone Coal*, for example, the restriction on mining at issue was designed to "abate activity akin to a public nuisance" and thereby protect the public health and welfare. 480 U.S. at 488. This Court nevertheless declined to hold that no taking had occurred until it had determined that there was no evidence the regulation destroyed the profitability of even one of Keystone's mines, but at most required Keystone to leave 2 per cent of its coal in the ground. *Id.* at 485, 495-496. See also *Penn Central*, 438 U.S. at 135-137.

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[1] The Takings Clause has been applied to the states through the Fourteenth Amendment since *Chicago, B. & Q. R.R.* v. *Chicago*, 166 U.S. 226 (1897).

Any other approach would be inconsistent with a principled approach to takings jurisprudence. Government's physical occupation of land is almost invariably held to be a compensable exercise of the power of eminent domain, whatever the purpose of the taking. See *Keystone Coal*, 480 U.S. at 488 n.18. When government instead entirely destroys the value of land by regulation, the economic effect and impact on the owner's liberty are indistinguishable. See *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 185 (1985). *Cf. United States* v. *Lynah*, 188 U.S. 445, 470 (1903) (when government "takes away the use and value" of land, "it is of little consequence in whom the fee may be vested"; there is a taking even though the government does not "appropriate the title").

The South Carolina Supreme Court's reliance on *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and its progeny is inapposite. Pet. App. 10. *Mugler* itself preceded this Court's holding that regulation can work a taking (in *Pennsylvania Coal* v. *Mahon*) by more than 30 years. The other cases rejecting takings claims that were relied upon below uniformly concerned police power regulations that did not totally destroy the value of property. See *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (87½ per cent diminution in value); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (regulation required destruction only of ornamental cedar trees on property); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962) (no evidence "which even remotely suggests that [the regulation] will reduce the value of the lot in question").

This Court's cases thus firmly stand for the proposition that government may not achieve its goals, however laudable, by the "complete extinction of the value of a parcel of property" unless it pays just compensation for the taking. *Keystone Coal*, 480 U.S. at 513 (Rehnquist, C.J., dissenting). The value and use of petitioner's two lots was totally destroyed by the Beachfront Management Act, the Court of Common Pleas found (Pet. App. 37-38, 40), and the judgment below must accordingly be reversed.[2]

II. The Takings Clause Should Be Interpreted To Require Just Compensation For All Regulatory Deprivations Of Property.

In addition to erroneously concluding that the government may destroy *all* economically viable use of land without paying just compensation, the South Carolina Supreme Court relied in this case on an expansive police powers or nuisance exception to the just compensation requirement. Although its view of this exception finds support in some of this Court's decisions, *amici* believe this interpretation of the Takings Clause is untenable and highly damaging to the security and predictability of the property interests the Framers intended to protect. We urge this Court to step back from some of its prior statements about the broad scope of the police powers or nuisance exception, and to give the Just Compensation Clause

[2] The SCCC argued in its brief in opposition at the petition stage that this Court should not reach the merits of petitioner's claim because petitioner had not exhausted his administrative remedies by applying for a variance. Br. in Opp. at 5. This argument has no merit. The Court of Common Pleas made a binding state law determination—neither disturbed nor questioned by the South Carolina Supreme Court—that a remand for further administrative proceedings would not have been proper. Pet. App. 39. The SCCC asserts that under 1990 amendments to the Beachfront Management Act, landowners like Lucas may be able to obtain a special permit in some instances to build seaward of the setback line. See S.C. Code Ann. § 48-39-290(D) (Cum. Supp. 1990). Whatever the effect of these amendments, it is clear that Lucas could not have benefited from them between 1988 and 1990. See *First English Evangelical Lutheran Church*, 482 U.S. at 318 (" 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings").

a place in our constitutional order in keeping with its text, history and purpose.[3]

A. The South Carolina Supreme Court Construed The Police Powers Or Nuisance Exception So Broadly As To Eviscerate The Requirement Of Just Compensation For Regulatory Takings.

The South Carolina Supreme Court held that the state's prohibition on development of petitioner's oceanfront lots fell within a "nuisance-like exception" to the just compensation requirement because the state had found that the restriction served to "prevent serious injury to the community." Pet. App. 12-15. The restriction was intended to prevent or slow erosion of a beach/dune system that the state legislature found protected life and property by acting as a storm barrier, generated tourism, and provided habitat for wildlife and a recreation area for South Carolina residents and visitors. Pet. App. 4-5.

As four members of this Court remarked in *Keystone Coal*, "nearly every action the government takes" can be

[3] Our belief that this Court should clarify elements of its takings jurisprudence is shared by leading commentators with widely divergent views of the Clause. There is general agreement that this Court's decisions in this area have been confused and contradictory. See, *e.g.*, Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4; Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1002-1003 (1982); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1170-1171 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). See also *Nollan*, 483 U.S. at 866, 867 (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence," so that "land-use planners" are "left guessing about how the Court will react to the next case, and the one after that").

described as preventing some grave public harm. 480 U.S. at 513 (Rehnquist, C.J., dissenting). Indeed, this case amply illustrates the extreme malleability of a "nuisance-like exception" triggered by any government action said to prevent serious public harm. As the dissenting Justices noted below, the Beachfront Management Act's primary goal is plainly to bring benefits to the state by "promoting tourism, creating a habitat for indigenous flora and fauna, creating a place which harbors natural beauty, and providing a barrier and buffer from high tides, storm surge, hurricanes and normal erosion"—none of which "can fairly be said to resemble a nuisance." Pet. App. 27. It is clear that, as a practical matter, the South Carolina Supreme Court's standard for reviewing regulatory deprivations of property imposes no meaningful restraint on government officials.

The South Carolina Supreme Court's view of the scope of a "nuisance-like exception" nevertheless finds support in some of this Court's pronouncements in regulatory takings cases. One articulation of the test for a regulatory taking is that, except when it denies an owner all economically viable use of his land, a regulation will be considered a taking only if it "does not substantially advance legitimate state interests." *Agins*, 447 U.S. at 260. See also, *e.g.*, *Nollan*, 483 U.S. at 834; *Keystone Coal*, 480 U.S. at 485. In another articulation that may appear to give the test more bite, this Court asks whether the state is restraining uses "that are tantamount to public nuisances." *Keystone Coal*, 480 U.S. at 491. It seems doubtful, however, whether many exercises of a state's police power will be held to require compensation if the test in either of these current formulations is applied. The term "nuisance" has meant "all things to all people" (W. Prosser & W. Keeton, THE LAW OF TORTS 616 (5th ed. 1984)), and public nuisances have been broadly defined to include

any interference with the community's health, safety, morals, comfort or convenience. *Id.* at 644. In consequence, the Court's "nuisance" exception has become all encompassing in cases where a regulatory restriction leaves any value in an owner's property, and the Court has upheld regulations destructive of property rights where the goal of regulation has been "to protect the public interest in health, the environment, and the fiscal integrity of [an] area" (*Keystone Coal*, 480 U.S. at 488), to promote a community's "health, safety, morals, or general welfare" (*Penn Central*, 438 U.S. at 125), or where restrictions are "reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit." *Id.* at 133 n.30.

In these circumstances, this exception to the just compensation requirement is more aptly labeled a "police powers" than a "nuisance" exception. Despite this Court's insistence that the nuisance exception is *not* coterminous with the police power (*Keystone Coal*, 480 U.S. at 491 n.20), it is difficult to imagine any regulatory diversion of property rights to public use that could not be said to address a "nuisance" as this Court has defined the term for purposes of this exception. See Epstein, 1987 SUP. CT. REV. at 21. The Court has held that a wide variety of regulatory deprivations of property did not require compensation because they were designed to prevent a "nuisance," including laws or regulatory decisions prohibiting existing breweries from manufacturing alcoholic beverages (*Mugler*, 123 U.S. 623); prohibiting an existing brick works from manufacturing bricks, in order to further the health and comfort of the community (*Hadacheck*, 239 U.S. 394); requiring the destruction of ornamental cedar trees harboring a plant disease that threatened nearby apple trees (*Miller*, 276 U.S. 272); and requiring that mine owners leave coal in the ground to support surface areas, though they had previously bought from the surface owners their right to any support estate. *Keystone Coal*, 480 U.S. 470. In other cases, this Court has even gone so far as to abandon any mention of "nuisance," upholding uncompensated takings merely because they amounted to exercises of the police power. *Penn Central*, 438 U.S. 104 (depriving owners of landmark building from uses of their air rights); *Andrus* v. *Allard*, 444 U.S. 51 (1979) (prohibiting sale of pre-existing parts of endangered birds); *Goldblatt*, 369 U.S. 590 (prohibiting the mining of an existing gravel pit below the water table). But see *Christy* v. *Lujan*, 490 U.S. 1114, 1116 (1989) (White, J., dissenting from denial of certiorari) (though "sustaining grizzly bears is a worthwhile and important governmental objective," a statute prohibiting a person from killing bears that are destroying his livestock may "den[y] the Fifth Amendment's protection against uncompensated takings").

The breadth that this Court has given to the nuisance or police powers exception—and that the South Carolina Supreme Court gave it in this case—is unwarranted in light of the history, explicit text, and central constitutional role of the Takings Clause.[4] Indeed, recognition of so ex-

[4] This Court has developed a second exception to the requirement of compensation for a partial regulatory taking where restrictions "secure[] an average reciprocity of advantage." *Pennsylvania Coal*, 260 U.S. at 415. This exception—really a recognition that compensation may be in kind, provided it is "just" (see R. Epstein, TAKINGS 195-196 (1985))—applies when the regulatory "burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the [regulation] will be benefited by another." *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting). See *Hodel* v. *Irving*, 481 U.S. at 715-716. It pertains most obviously to traditional zoning regulations. See *Agins*, 447 U.S. 255; *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The "average reciprocity of advantage" exception is not at issue in this case. Although the Court in

(Footnote continued on following page)

pansive an exception has effectively interpreted the Takings Clause out of the Constitution as an independent safeguard against regulatory deprivations. Under current doctrine it has become largely duplicative of lower-tier due process protection. This Court should heed the warning given by Justice Holmes, speaking for the Court in *Pennsylvania Coal*, against the very expansion of the exception that has occurred:

> "When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." 260 U.S. at 415.

B. The Text, History, And Constitutional Role Of The Just Compensation Clause Are Inconsistent With The Recognition Of Any Police Powers Or Nuisance Exception.

The text of the Takings Clause is unambiguous, mandating that "private property [shall not] be taken for public use, without just compensation." While *amici* recognize that courts may face problems in applying even such plain language to some marginal situations, the Clause's four operative concepts ("private property"; "taken"; "public use"; and "just compensation") are unusually clear, especially as applied to the facts of this case. A person's use of his land is at the very core of the meaning of "private property." See *General Motors Corp.*, 323 U.S. at

[4] *continued*
Keystone Coal tentatively suggested that a nuisance exception to the just compensation rule "is consistent with the notion of 'reciprocity of advantage' " (480 U.S. at 491), historically the two exceptions have been treated as quite distinct, as the just-cited passages in *Pennsylvania Coal*, *Penn Central*, and *Irving* illustrate.

378 ("private property" encompasses not just land as a physical thing, but the bundle of rights "to possess, use and dispose of" the land); *Hodel* v. *Irving*, 481 U.S. at 716-718 (abolition of descent and devise of land a taking). Thus, as the Court of Common Pleas held, the bar on development at issue in this case eliminated "essential elements of ownership" (Pet. App. 39) and deprived Lucas of "private property in the most traditional sense of the term" (Pet. App. 38). In its literal sense, the word "taken" certainly comprehends the diminution of the value of land by regulation, as this Court's entire regulatory takings jurisprudence affirms. See *Penn Central*, 438 U.S. at 143-144 (Rehnquist, J., dissenting). *Cf. Dugan* v. *Rank*, 372 U.S. 609, 625 (1963).[5] This Court has also given a plain reading to the limitation that government takings must be for "public use," holding that the power to take is as broad as the police power. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984). The Court has found the concept of "just compensation" similarly clear. See *Dugan*, 372 U.S. at 624-625 (compensation is measured by the extent of the deprivation of property, *i.e.*, "the difference in market value of the [property] before and after the . . . taking").

The language of the Takings Clause is therefore plain, and it admits of no exception. Although government may

[5] Madison's initial proposal, that "[n]o person shall be . . . obliged to relinquish his property . . . for public use, without a just compensation," could perhaps more easily have been construed to be limited to physical deprivations of property. *Speech Proposing the Bill of Rights*, 12 THE PAPERS OF JAMES MADISON 201 (C. Hobson & R. Rutland eds. 1979). The substitution of the more expansive command that property shall not be "taken" requires the application of the Fifth Amendment to regulatory deprivations of property. See generally Michelman, 80 HARV. L. REV. at 1186-1187 ("Wordplay . . . cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint").

deprive a person of his property in order to put it to public use, government's right to do so is conditioned on the payment of just compensation. Given the explicit command of the text, the creation of *any* nuisance or police powers exception is illegitimate.

The Takings Clause's history and constitutional role likewise indicate that there should be no nuisance or police powers exception to the Clause. The payment of compensation when government took private property to serve the common good was "a principle of the common law . . . of immemorial usage" (Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 583 (1972)), and the continued "protection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270 (1988). See generally J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it appeared this would benefit the general public welfare.[6]

On the contrary, the deterioration of the nuisance exception into a constitutional loophole for property-destroying

[6] It appears that the only exception consistently recognized at common law—one standing "as much upon tradition as upon principle" (*Pennsylvania Coal*, 260 U.S. at 416)—was for the exercise of royal prerogative power to destroy property in the path of a fire in order to prevent immediate harm to others. See *id.* at 415; *Bowditch* v. *Boston*, 101 U.S. 16 (1879); W. Stoebuck, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 196 (1977). *Cf. United States* v. *Caltex, Inc.*, 344 U.S. 149, 156 (1952) ("destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy").

regulations that merely advance "legitimate state interests" (*Keystone Coal*, 480 U.S. at 485) is wholly inconsistent with the historical purpose of the Clause. The Framers of the Constitution and Bill of Rights regarded the protection of individual property rights as "the first object of government" (FEDERALIST No. 10, at 78 (Madison) (C. Rossiter ed. 1961)), and would have been shocked at the notion that the Takings Clause requires little more than lower-tier due process scrutiny. "Government," James Madison wrote, "is instituted no less for protection of the property than of the persons of individuals." *Id.*, FEDERALIST No. 54, at 339. The Fifth Amendment's Just Compensation Clause lies at the very heart of this protection.

The Takings Clause was one of a series of protections in the Bill of Rights guarding the individual from arbitrary or oppressive actions of transitory political majorities. The Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally-mandated compensation that would have to be paid for the taking. Property could always be taken for the common good—but only if government were prepared to pay compensation out of the common purse. Hence the distrust of government underlying our constitutional structure of separated powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excess zeal of property-envious communities. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government takes the individual's property, it must compensate him for that significant intrusion.

Finding " 'no warrant in the laws or practices of our ancestors' " for governmental " 'authority [to] inva[de] pri-

vate right under the pretext of the public good' " (*United States* v. *Lynah*, 188 U.S. at 470 (citation omitted)), this Court has long recognized that the purpose of the Takings Clause was to shield individual rights from government action that would convert one man's property to community use. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). The nuisance or police powers exception to the just compensation requirement—explained with the slogan that "[t]here must be progress, and if in its march private interests are in the way, they must yield to the good of the community" (*Hadacheck*, 239 U.S. at 410)—is inconsistent with this purpose. The teaching of the Takings Clause is that where "progress" is achieved by depriving individuals of property, the costs "must be borne by all [a community's] taxpayers [and not] imposed entirely on the owners of the individual properties." *Penn Central*, 438 U.S. at 139 (Rehnquist, J., dissenting). The cardinal principle that should guide interpretation of the Takings Clause is that government may *not* sacrifice the property interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of *paying for the change*." *Pennsylvania Coal*, 260 U.S. at 416 (emphasis added). See also *Nollan*, 483 U.S. at 841-842.

Support for a nuisance or police powers exception to the just compensation rule is to be found in neither the plain language nor the structural role of the Takings Clause

in our constitutional scheme. We urge this Court to hold that there is no such exception.

C. Any Nuisance Exception Should Be Limited To Circumstances In Which Government Regulates To Prevent Harmful And Direct Physical Invasions Of Other Owners' Property.

In light of the text, history, and constitutional role of the Just Compensation Clause, *amici* question whether any exception to the Clause's mandate can be justified. The Framers cannot have intended this Court to create an exception to a specific constitutional provision unambiguously commanding that compensation be paid for a taking. Any exception would derogate from the original purpose of the Clause to inhibit takings and prevent their use to redistribute property from individuals to the community at large.

Nevertheless, *amici* recognize that the Clause "has not always been read literally" (*Penn Central*, 438 U.S. at 142 (Rehnquist, J., dissenting)), and that a nuisance or police powers exception may find support in some of this Court's cases. If this Court is not prepared to abandon the exception entirely and return to the original meaning of the Takings Clause, it should at least construe the exception much less expansively than did the South Carolina Supreme Court.

A broad police power exception would make a mockery of the Fifth Amendment's just compensation dictate, as we have already explained, reducing it to a mirror image of due process and a shadow of its intended role as an independent and stringent limitation on the way government may treat its citizens. See *supra* Part II.A. It would be no more acceptable to ground an exception in state nuisance law. The law of private nuisance is "the least systematic area of the tort law" and a "dumping ground"

for actions that "do not neatly fit into any recognized doctrinal niche." Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 49 (1979). The law of public nuisance is even more uncertain and incoherent, with states able to label most any private action lying within the police power as a public nuisance. W. Prosser & W. Keeton, THE LAW OF TORTS 643-645. It cannot be that the scope of the Takings Clause's protection of individual property rights is subject to the vagaries of state private or public nuisance law, and that the level of protection varies according to the jurisdiction in which an aggrieved owner finds himself. That would in effect make "the just compensation requirement . . . legislative instead of constitutional." R. Epstein, TAKINGS 115. As four members of this Court recognized in *Keystone Coal*, the contours of any exception to the mandate of the Just Compensation Clause must be "a question of federal, rather than state, law, subject to independent scrutiny by this Court." 480 U.S. at 512 (Rehnquist, C.J., dissenting).

If the Framers' intentions are not to be wholly thwarted, any reasonable nuisance exception to government's obligation to pay compensation for deprivations of property occasioned by its land-use restrictions would have to be limited to regulations that advance the "discrete and narrow purpos[e]" (*id.* at 513) of prohibiting an owner "from using its property in a narrow set of noxious ways." *Penn Central*, 438 U.S. at 146 (Rehnquist, J., dissenting). *Amici* submit that the nuisance exception—if there is one—should encompass only regulations preventing uses that involve direct physical invasions of other owners' property. See generally R. Epstein, TAKINGS 107-125.[7]

[7] The issue in this case is whether government may immunize itself from the just compensation requirement by regulating with

(Footnote continued on following page)

The results of some of this Court's leading regulatory takings decisions can be explained by a nuisance exception limited in this manner. There was clear evidence of such a nuisance in *Hadacheck*, for example, where "fumes, gases, smoke, soot, steam and dust" had escaped petitioner's brick-making plant and had "caused sickness and serious discomfort to those living in the vicinity." 239 U.S. at 408. Similarly, in *Miller* v. *Schoene* a fungal plant disease was physically transmitted across property boundaries, being "communicated by spores" from a landowner's cedar trees to his neighbors' apple trees. 276 U.S. at 278. *Cf. Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659 (1878) (uphold-

[7] *continued*

certain ends in mind. There is no question here about the proper standard for evaluating the means by which government chooses to further its ends. Any nuisance exception, however, must include standards for evaluating both government's goals and its means of achieving them.

In *Nollan*, 483 U.S. at 834-835 & n.3, this Court indicated that the appropriate inquiry as to means is whether a land use regulation "substantially advances" the state's interest, suggesting an intermediate level of scrutiny. But *Curtin* v. *Benson*, 222 U.S. 78 (1911), suggests the inquiry should be more stringent: whether a land use regulation is narrowly tailored to achieve the government's interest. In *Curtin*, the United States had prevented an owner of unfenced land within a national park from grazing his cattle upon his property, as a means of preventing the cattle from wandering onto government-owned land. This Court held that the government could not regulate away such "essential uses of private property." *Id.* at 86. To ensure "that no injury could result to others," the United States might require that an owner fence his property to prevent "the trespass of his cattle on other lands," or it might simply prohibit such trespasses. *Ibid.* But it could not constitutionally seek to prevent injury by denying the owner use of his grazing lands.

A demanding analysis of the connection between a regulation and the state interest, comparable to that used in assessing invasions of other fundamental rights, would seem to be in keeping with the importance the Framers' attached to the protection of property rights, and to the centrality of property rights, as a practical matter, in individual lives and in our polity.

ing ordinance abridging prior charter to transport waste through streets, where restriction necessary to eliminate noxious odors, disease transmission, and infestations by insects). *Keystone Coal*, 480 U.S. 470, may also be explained using this nuisance test, for the removal of the support estate would have directly caused the collapse of the surface, which might be regarded as a physical invasion.[8]

While at odds with the Framers' intent that compensation *always* be paid for deprivations of property, a physical invasion exception does provide a measure of protection to an individual's enjoyment of his own property. The test allows every owner to do what he will with his own property—without fear of uncompensated regulatory interference—provided that his acts do not invade another owner's property and hence *that* owner's right to make what use he chooses of *his* property.

A physical invasion test also has a fair doctrinal foundation. Private nuisances traditionally "are invasions of the plaintiff's property that fall short of trespasses but which still interfere in the use and enjoyment of land." Epstein, 8 J. LEGAL STUD. at 53. See, *e.g.*, *Morgan* v. *High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953). This test thus captures the essence of traditional private nuisance law, free of the accretions that have come with nuisance law's role as a repository for actions in search of a label.

[8] *Amici* concede that not all this Court's cases can be explained in this manner. The decision in *Mugler*, 123 U.S. 623, however, preceded the development of regulatory takings jurisprudence by many years; and this Court has recently cast doubt on the continuing vitality of *Goldblatt*, 369 U.S. 590. See *Nollan*, 483 U.S. at 835 n.3 (criticizing *Goldblatt* because it appears to assume that "the standards for takings challenges, due process challenges, and equal protection challenges are identical"). *Penn Central* and *Andrus* cannot be explained as physical invasion cases.

Moreover, because a physical invasion test turns on the existence "of a natural state of affairs" (Epstein, 8 J. LEGAL STUD. at 53)—hence on indicia that will often be objectively determinable—it would be relatively simple to administer. Property owners and government planners would have clear guidance regarding the circumstances in which land-use regulation will give rise to a constitutional duty to compensate. Given modern-day pressures on the public fisc, this sort of foreknowledge of whether a particular regulation is likely to effect a compensable taking is of obvious benefit to government. Under current law, however, with its lack of "any 'set formula' for determining when 'justice and fairness' " require compensation and its reliance on "ad hoc, factual inquiries" (*Penn Central*, 438 U.S. at 124), considerable uncertainty about whether land use regulation will be held a taking is inevitable. See, *e.g.*, *Executive Order No. 12630*, 53 FED. REG. 8859 (March 18, 1988).

Applied to the facts of this case, this nuisance exception would require reversal of the South Carolina Supreme Court's decision. The South Carolina legislature and SCCC found that building on lots seaward of the setback line would cause the natural process of erosion to accelerate or change so as to put persons and property at risk from the ocean. No physically invasive act of the owners of such lots is claimed to cause harm: buildings on oceanside lots, in and of themselves, would be "harmless enough." *Bryant* v. *Lefever*, 4 C.P.D. 172 (1878-1879), as quoted in Epstein, 8 J. LEGAL STUD. at 58. It is the forces of nature that would be the direct and only physically invasive cause of any damage to persons or property.

Finally, though petitioner has not challenged South Carolina's justification for the Beachfront Management Act as being necessary to protect life and property in an economical and effective manner (Pet. App. 4), it is clear

that no imminent public health emergency would be threatened by building single family houses on Lucas' lots—which have existing homes on either side (Pet. App. 36). The Act cannot plausibly be viewed as an emergency public health measure, but is an example of an everyday, long-term, public policy determination, as the dissenters below recognized (Pet. App. 27).

If the state wishes to protect the property of other owners, and preserve the integrity of the beach/dune system for purposes like tourism and recreation, it cannot do so by taking Lucas' property without compensation. Redistributing existing property rights to serve these purposes is a project that can only be undertaken out of the public purse.

CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed.

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